

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

**ELIAS ZAVALA, a/k/a SHANNON
ESTRADA, a/k/a FRANCISCO
ALVAREZ-ESTRADA,**

Defendant.

CASE NO. 8:01CR259

ORDER

This matter is before the Court on the Defendant's motion on resentencing (Filing No. 133). The government filed a response (Filing No. 134).

Zavala requests through his attorney, Steven E. Achelpohl, the following: an amended sentencing schedule, allowing time for sentencing discovery; a jury trial or hearing on the issues resulting in enhancements to the offense level, including drug quantity, obstruction of justice, role, gun possession; a determination of each enhancing factor on the basis of the beyond-a-reasonable-doubt standard of proof, or a determination of the applicable standard of proof on the basis of the beyond-a-reasonable-doubt standard; and the application of the Federal Rules of Evidence at the sentencing hearing. These issues are discussed below.

Jury Trial or Hearing; Beyond a Reasonable Doubt Standard

With respect to the Defendant's arguments based on *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005), defense counsel's arguments are noted for the record. However, the Eighth Circuit has determined that a district court may find sentencing factors by a preponderance of the evidence and specifically that *Booker* does not require that such

enhancements be proved beyond a reasonable doubt. *United States v. Artis*, 161 Fed. Appx. 627, at **1 (8th Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 12, 2006) (No. 05-10431).

Amended Sentencing Schedule Including Discovery

For other reasons, the resentencing hearing has been continued to June 12, 2006. The request to include a discovery period is denied, in light of the denial of the request for a jury hearing on the enhancement issues.

Federal Rules of Evidence at Sentencing

The Defendant asks that the rules of evidence be applied at the resentencing hearing, citing no authority to support this proposition. It is axiomatic that the Federal Rules of Evidence do not apply at sentencing hearings. *See, e.g. United States v. Fleck*, 413 F.3d 883, 894 (8th Cir. 2005). The request is denied.

IT IS ORDERED that the Defendant's motion on resentencing (Filing No. 133) is denied.

DATED this 4th day of May, 2006.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge